INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statutes involved	2
Statement	3
Argument	6
Conclusion	10

CITATIONS

Cases:

Bong Youn Choy v. *Barber*, 279 F. 2d 642 — 9
Brownell v. *Carija*, 254 F. 2d 78 — 9
Chaunt v. *United States*, 364 U.S. 350 — 7
Cubillos-Gonzalez v. *Immigration and Naturalization Service*, 352 F. 2d 782 — 9
Kassab v. *Immigration and Naturalization Service*, 364 F. 2d 806 — 7
Landon v. *Clarke*, 239 F. 2d 631 — 7
Langhammer v. *Hamilton*, 295 F. 2d 642 — 7
Matter of Box, 10 I & N Dec. 87 — 7
Matter of H—R—, 7 I & N Dec. 651 — 9
Matter of S— and B—C—, 9 I & N Dec. 444 — 7
United States ex rel. Szlajamer v. *Esperdy*, 188 F. Supp. 491 — 9
Viruette Torres v. *Hoy*, 269 F. 2d 289 — 7
Woodby and Sherman v. *Immigration and Naturalization Service*, Nos. 40 and 80, this Term, decided December 12, 1966 — 10

244-610—67

Statute:

Immigration and Nationality Act 66 Stat. 166, as amended, 8 U.S.C. 1101 et seq.:

	Page
Section 101(a)(15), 8 U.S.C. 1101(a)(15)	3, 8
Section 212(a), 8 U.S.C. 1182(a)	2
Section 212(a)(19), 8 U.S.C. 1182(a)(19)	2, 3
Section 212(a)(20), 8 U.S.C. 1182(a)(20)	2, 3
Section 212(a)(26), 8 U.S.C. 1182(a)(26)	3
Section 241(a)(1), 8 U.S.C. 1251(a)(1)	2
Section 241(a)(9), 8 U.S.C. 1251(a)(9)	3
Section 245, 8 U.S.C. 1255	4

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 921

ULRICH OTTEN, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet App. A) is reported at 367 F. 2d 579.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 1966. The petition for a writ of certiorari was filed on December 29, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the knowing use of another person's passport and United States nonimmigration visa to

enter this country constitutes entry by fraud or by wilful misrepresentation of a material fact for which deportation may be ordered.

2. Whether, in any event, petitioner was properly ordered deported as an alien who was excludable at the time of his entry because he was an immigrant not in possession of a valid unexpired immigration visa.

STATUTE INVOLVED

Section 241(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(1) provides:

> Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
> (1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at ~~the time~~ of such entry * * *

Section 212(a) of the Immigration and Nationality Act, 8 U.S.C. 1182(a) provides in part:

> Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> * * * * *
>
> (19) Any alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by willfully misrepresenting a material fact * * *
>
> (20) Except as otherwise specifically provided in this chapter, any immigrant who at the time of application for admission is not in possession of a valid unexpired immigrant visa * * * and a valid unexpired passport * * *

STATEMENT

1. Petitioner, a citizen and native of the West German Federal Republic, entered the United States on May 3, 1964, by using a West German passport and United States nonimmigrant visa issued to one Heinz Nass (R. 71, 75, 77–79, 293). On October 1, 1964, he was served with an order to show cause why he should not be deported as an alien excludable at entry because he was an alien immigrant not in possession of valid entry documents (Section 212(a)(20) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(20)) (R. 293–294). On October 19, 1964, additional charges of deportability were filed alleging, among other things, that petitioner was also excludable at the time of entry as an alien who sought to enter the United States by fraud or by wilful misrepresentation of a material fact (Section 212(a)(19) of the Act, 8 U.S.C. 1182(a)(19)) (R. 299–300).[1] After extensive hearings, a special inquiry officer found petitioner deportable under Section 241(a)(1) of the Act (8 U.S.C. 1251(a)(1)) because he was excludable at the time of entry for not being in possession of a valid immigration visa (8 U.S.C.

[1] The additional charges alleged that, after he had been admitted as a nonimmigrant, petitioner failed to comply with the conditions of the nonimmigrant status under which he was admitted (Sections 101(a)(15) and 241(a)(9) of the Act, 8 U.S.C. 1101(a)(15) and 1251(a)(9)) and that he was excludable at entry as a nonimmigrant alien not in possession of a valid nonimmigrant visa (Section 212(a)(26) of the Act, 8 U.S.C. 1182(a)(26)). In view of the conclusion that petitioner was deportable under the other two alternative charges, the special inquiry officer did not consider these two additional charges (R. 49, 52).

1182(a)(20)), and, in the alternative, because he entered the United States by fraud (8 U.S.C. 1182(a)(19) (Pet. App. C; R. 49–56). The hearing officer also denied petitioner's application under Section 245 of the Act (8 U.S.C. 1255) for discretionary adjustment of status to an alien lawfully admitted for permanent residence (R. 52–53). Petitioner was granted voluntary departure in lieu of deportation, unless he failed to depart when required, in which case he is to be ordered deported to Australia, the country of his first choice, or, if that country is unwilling to accept him, to Germany (R. 56, 290). On December 2, 1965, the Board of Immigration Appeals dismissed petitioner's appeal (Pet. App. B; R. 1–7). The court of appeals affirmed the deportation order in a per curiam opinion (Pet. App. A).

2. The evidence at the deportation hearing consisted primarily of petitioner's testimony and may be summarized as follows.

Petitioner is a native and citizen of Germany (R. 71, 75, 77–79, 293). Prior to his entry into the United States, he had been in business for himself designing and building sports cars in Bremen, West Germany (R. 102, 104, 167–169). During the autumn of 1963, petitioner was approached by Paul Croas, a United States citizen then working as a civilian with the United States Army in West Germany, who wanted petitioner to do some work on his automobile (R. 101–102, 185–186, 334). This business

relationship developed into friendship; eventually the two men decided to form a partnership for the purpose of manufacturing sports cars (R. 104–108, 171–172, 180–182, 335–338). When Croas left Germany in March 1964, to establish residence in San Antonio, Texas, he was to attempt to find financing and factory space for their proposed joint venture (R. 108–112, 301, 338–340).

In April 1964, petitioner sold his business in Germany. He derived no profit from the transaction and left no business pending, so that at the time of his departure for the United States he had no property, permanent residence or employment to which he might return (R. 91, 156, 169–171, 183). Later in the same month, petitioner had Heinz Nass, an employee in his former business, obtain a German passport and American nonimmigrant visa ostensibly for the purpose of making a business trip in conjunction with petitioner's already liquidated sports car business (R. 80–82, 87–91, 185, 295). To obtain the American visa for Nass, petitioner wrote a letter to the American consulate in which he falsely stated that Nass was his present employee, that Nass was making a business trip to Texas for him and that he would pay Nass' return trip expenses (R. 90–91). In fact, petitioner intended to use the documents issued to Nass for his own entry into the United States (R. 88–89).

After obtaining Nass' passport and visa, petitioner flew from Frankfurt to New York, under the name of Heinz Nass, arriving in this country on May 3, 1964

(R. 91). He was admitted as a temporary visitor for business using Nass' unaltered German passport and United States visa (R. 77–79, 83, 144–145, 295).[2]

After his arrival in New York City, petitioner telephoned Croas, who sent him Texas license plates and registration for a sports car which petitioner had shipped from Germany to New York (R. 92–93). Petitioner drove from New York on May 8, 1964, and joined Croas in San Antonio on May 11 or 12. Approximately a week of inconclusive business negotiations followed, during which Croas and petitioner formed a partnership and unsuccessfully sought capital and working space (R. 113–122). On May 22, 1964, petitioner commenced working as a mechanic for German Automotive Inc., San Antonio (R. 234, 296). Croas soon left for other employment in El Paso, Texas (R. 137).

ARGUMENT

1. Petitioner, while admitting that he knowingly used the passport and visa of another man to enter the United States, contends that this deception as to identity at the time of entry was not a misrepre-

[2] There was considerable evidence—material to petitioner's application for discretionary relief—that at the time petitioner left Germany he was in financial trouble (R. 218–219, 245–257, 259, 307–309, 314–316). An order of arrest had been issued in Germany on June 10, 1964, containing numerous fraud counts in relation to debts, which also charged petitioner with having made false statements when applying for a German passport on March 18, 1964 (R. 315). Petitioner admitted at the deportation hearing that he had told German authorities that he had lost his previous passport when, in fact, it was being held by a tax attorney as security for a debt (R. 214, 256, 266–267).

sentation of a material fact (Pet. 4–6). This contention is patently without merit. A misrepresentation of fact is material if the alien would have been excluded on the true facts or if the misrepresentation tends to foreclose a line of inquiry which is relevant to the alien's eligibility and which might have resulted in a proper determination that he be excluded. See, *e.g., Kassab* v. *Immigration and Naturalization Service,* 364 F. 2d. 806 (C.A. 6); *Langhammer* v. *Hamilton,* 295 F. 2d 642, 647–648 (C.A. 1); *Viruette Torres* v. *Hoy,* 269 F. 2d 289, 291 (C.A. 9); *Landon* v. *Clarke,* 239 F. 2d 631, 634–636 (C.A. 1); *Matter of S— and B—C—,* 9 I & N Dec. 444, 447; cf. *Chaunt* v. *United States,* 364 U.S. 350, 355. Under this test, petitioner's misrepresentation as to his identity was material to the entry he sought. He had no passport or valid entry documents for himself. Moreover, it would have been impossible for him to obtain a United States visa because he did not have a valid German passport.

Petitioner's reliance on *Matter of Box,* 10 I & N Dec. 87—for the proposition that misrepresentation of identity at entry is not material—is misplaced. That case held that use of a fictitious identity, which the alien had used for some eighteen months previous to his visa application in order to escape persecution in his country, was not material to the granting of the visa when investigation under the true identity would have revealed no reason for denying the visa. Petitioner's misrepresentation was not in relation to an application for a visa but in relation to entry. Since he would clearly have been excluded at the

time of entry on the true facts, the misrepresentation was material to the decision of the inspecting immigration officer to admit petitioner to the United States.

2. Petitioner was ordered deported on the alternate ground that, at the time of his entry, he was an immigrant not in possession of a valid unexpired immigration visa. Petitioner contends that the evidence is insufficient to establish that he was an immigrant (Pet. 6–7).[3] So far as pertinent to the instant case, Section 101(a)(15) of the Act (8 U.S.C. 1101(a)(15)) provides that the term "immigrant" means every alien except "(B) an alien * * * having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure." Petitioner conceded in the court of appeals that an alien is properly presumed to be an immigrant unless he can establish that he is entitled to nonimmigrant status; that he entered this country with the intention to remain indefinitely on the understanding that Croas could readily obtain permanent residence status for him; and that such intention was inconsistent with nonimmigrant status. The concession was based on petitioner's testimony at the hearing (R. 115–116, 145, 149, 150). Moreover, as the Board of Immigration

[3] As we have noted (*supra*, note 1), petitioner was also charged with being a nonimmigrant not in possession of a nonimmigrant visa (R. 300). This charge was not considered in view of the above finding. However, petitioner is admittedly an alien and therefore must be either an immigrant or a nonimmigrant. Fraudulent entry under another person's visa made him deportable under either classification.

Appeals noted (R. 3), there was other undisputed evidence indicating petitioner was an immigrant:

> The respondent has admitted that he intended to remain in the United States "indefinitely" (Ex. 4). He testified that he had no permanent place of abode in Germany at the time of his departure (pp. 105, 106); that he had sold his business and was unemployed at the time of his departure (pp. 107, 119); that he had no family ties in Germany since he had separated from his wife some three or four years prior to his departure (pp. 14 & 15); and that he entered the United States for the express purpose of establishing an automobile business (Ex. 4, p. 53). We conclude that on this record the respondent was an immigrant at the time of his last entry and required to present a valid unexpired immigration visa.

Petitioner's suggestion that he may be considered a nonimmigrant when his admitted intent to stay permanently is considered with his alleged intent to stay only if he could do so legally (*e.g.*, by having his status adjusted to that of permanent resident) is without merit where, as here, his initial entry is illegal. This is amply demonstrated by the cases petitioner cites. See *Bong Youn Choy* v. *Barber*, 279 F. 2d 642, 645–646 (C.A. 9); *Brownell* v. *Carija*, 254 F. 2d 78, 79–80 (C.A.D.C.); see also *Cubillos-Gonzalez* v. *Immigration and Naturalization Service*, 352 F. 2d 782 (C.A. 9); *United States ex rel Szlajmer* v. *Esperdy*, 188 F. Supp. 491, 495 (S.D.N.Y.); *Matter of H—R—*, 7 I & N Dec. 651.

Petitioner acknowledges that "this case and the principles involved are of limited significance" (Pet.

7). No issue warranting review by this Court is presented.[4]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[4] The decisions in *Woodby and Sherman* v. *Immigration and Naturalization Service*, Nos. 40 and 80, this Term, decided December 12, 1966, setting a new standard of persuasion applicable to deportation proceedings, do not require a remand of this case to the Service. The first question presented—whether an admitted misrepresentation is material—is one of law. The second question, relating to an alternative ground for deportation—whether petitioner was an immigrant—is capable of resolution on the conceded facts.

U.S. GOVERNMENT PRINTING OFFICE: 1967